FOR ARGUMENT

No. 76-749

In the Supreme Court of the United States

OCTOBER TERM, 1977

PFIZER INC., ET AL., PETITIONERS

v.

THE GOVERNMENT OF INDIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

In response to the Court's order of January 25, 1977, the Solicitor General set forth the views of the United States at the time this case was pending on petition for a writ of certiorari. We adhere to the views in that memorandum, but set forth below some additional considerations in response to the arguments of petitioners.

1. Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 15, provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages. Section 1 of the Act, 38 Stat. 730, 15 U.S.C. 12, provides that "[t]he word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Respondents filed complaints alleging in substance that petitioners had engaged in an unlawful combination and conspiracy to restrain interstate and foreign trade and commerce in the manufacture and sale of broad spectrum antibiotics and related products, and had conspired to monopolize, attempted to monopolize, and monopolized this trade and commerce, in violation of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2. The alleged violations were said to have been committed through an agreement confining the manufacture of and sale of tetracycline to the petitioners, restricting the sale of bulk tetracycline within the United States and abroad, and selling within the United States and abroad at substantially identical and non-competitive prices. It was further alleged that petitioner Pfizer had launched the violations by defrauding the United States Patent Office in order to obtain a monopoly of tetracycline. (App. A-28 to A-33, A-86 to A-91, A-121 to A-126.)

The complaints stated that petitioners' managements within the United States had controlled, reviewed and approved their companies' restrictive policies and agreements; and that substantial quantities of the product involved had been manufactured in the United States for shipment abroad, although some may have been manufactured abroad by petitioners' licensees or subsidiaries. Finally, each respondent alleged that it had been injured in its business or property by the violations in an undetermined amount, and sought appropriate relief. (App. A-25 to A-26, A-38 to A-40, A-82 to A-83, A-96 to A-97, A-117 to A-119, A-131 to A-132.)

Section 4 does not limit the right to sue to United States citizens or residents, but broadly gives it to "[a]ny person," and Section 1 includes foreign corporations within the definition of "person." If the foregoing allegations had

been made by a foreign businessman or foreign corporation, the plaintiff's capacity to sue would be undisputable.[1]

Accepting, as we must, respondents' allegations, the question is whether a plaintiff claiming to have been injured by a price-fixing-and-monopolization conspiracy that restrained trade both within and outside the United States, is foreclosed from suit solely because it is a foreign government rather than a foreign citizen or a foreign corporation.[2]

2. Congress adopted the antitrust laws primarily to protect American consumers and American entrepreneurs from the pernicious effects of restraints of trade in "commerce." But it defined commerce to include not only that "among the several States," but also with "foreign nations." 15 U.S.C. 1, 2, 3, 12. Moreover, in defining "persons" in Section 1 of the Clayton Act, Congress did not restrict the right to sue to citizens or residents of the United States, or to domestic corporations. In giving corporations the right to sue, Congress expressly included

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[1] For examples of cases in which foreign plaintiffs were permitted to maintain suits in similar circumstances, see *Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc.*, 375 F. Supp. 610 (E.D. Pa.), modified in part, 383 F. Supp. 586; *Industria Siciliana Asfalti Bitumi, S.p.A. v. Exxon Research and Engineering Co.*, 1977-1 Trade Cases para. 61,256 (S.D. N.Y.). Cf. *Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance*, 451 F. 2d 727 (C.A. 2).

If a respondent government had operated through a corporate instrumentality organized under its own laws and wholly owned or controlled by it, that instrumentality also would be entitled to sue. Cf. *Amtorg Trading Corp. v. United States*, 71 F. 2d 524 (C.C.P.A.).

[2] Such actions, of course, must meet the statutory requirement that the plaintiff allege and prove injury to its business or property. Cf. *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251; *Illinois Brick Co. v. Illinois*, No. 76-404, decided June 9, 1977; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477. The complaints here so allege (App. A-38 to A-39, A-96, A-131).

"corporations * * * existing under * * * the laws of any foreign country." 15 U.S.C. 12. Congress thus concluded that protection of the interstate and foreign commerce of the United States required that antitrust remedies be available to foreign plaintiffs.

The treble damage remedy was provided for "any person" injured by "any violation of the antitrust laws," again without limiting such persons to American citizens or residents. That remedy is intended not only to provide compensation to the victim of antitrust violations (see, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-266; *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139), but also to provide "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc.*, *supra*, 392 U.S. at 139. See, *e.g.*, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236; *Radovich* v. *National Football League*, 352 U.S. 445, 454; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131; *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318; *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-660; *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642, 648.

Notwithstanding these purposes, *United States* v. *Cooper Corp.*, 312 U.S. 600, held that the United States was not a "person" entitled to sue for treble damages under the definition of "person" in former Section 7 of the Sherman Act, 26 Stat. 210, which was similar to that in Section 1 of the Clayton Act.[3] The reason for that decision, the Court

[3]Section 7 was repealed in 1955 on the ground that it was redundant. 69 Stat. 283.

explained shortly after in *Georgia* v. *Evans*, 316 U.S. 159, 161, was that Congress had provided the United States with an array of public remedies and sanctions not available to others who might be injured by antitrust violations. Speaking only of the United States, the Court in *Cooper* had noted that "[s]ince, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it."[4] 312 U.S. at 604-605. It emphasized, however, that "there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by use of the term, to bring state or nation within the scope of the law. * * * Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction." 312 U.S. at 604-605.

Applying these principles in *Georgia* v. *Evans*, the Court held that the State of Georgia was a "person" entitled to sue for treble damages, on the ground that it lacked the public enforcement powers of the United States and thus had no remedies for violation of the Sherman Act except the private action. The Court pointed out that

[4]The court cited *In the Matter of the Will of Fox*, 52 N.Y. 530, affirmed *sub nom. United States* v. *Fox*, 94 U.S. 315. *Fox* held that the United States was not a "person" under the New York Statute of Wills, defining persons to whom real property could be devised. The Court apparently followed the interpretation by the New York Court of Appeals of the state's statute. 94 U.S. at 320. But in another New York case, *The Republic of Honduras* v. *Soto*, 112 N.Y. 310, 311-312, 19 N.E. 845, 846, decided after *Fox* and less than two years before the passage of the Sherman Act, the New York Court of Appeals held that a foreign government was a "person" under the New York Code of Civil Procedure because it was "a legal entity capable of acquiring and enjoying property and protecting itself from injuries thereto in the courts of foreign countries * * *."

Cooper had not ruled "that the word 'person' abstractly considered, could not include a governmental body." 316 U.S. at 161. Indeed, it noted that the Court had already held that a municipality was a person entitled to sue for damages under the Sherman Act (*Chattanooga Foundry* v. *Atlanta*, 203 U.S. 390), and that it would therefore be unreasonable to infer that Congress intended to define "person" so restrictively as to exclude a State simply because it is a State. 316 U.S. at 162-163.

Since the exclusion of political bodies from the definition of "person" in the antitrust laws would have been inconsistent with the right of states and municipalities to sue that was recognized in *Chattanooga Foundry* v. *Atlanta*, *supra*, and *Georgia* v. *Evans*, *supra*, those cases demonstrate that the absence of any reference to political entities in the definition of "person" in Section 1 does not evidence an intent to exclude them.[5]

3. This conclusion is consistent with general rules of statutory construction. Section 1 of the Clayton Act provides that "person" is "deemed to include corporations and associations * * *." In common usage, "includes" is an illustrative term, analogous to "comprehends" or "embraces." It therefore "imports a general class, some of whose particular instances are those specified in the definition" (*Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125

[5]Petitioners make an elaborate argument that *Evans* was based on considerations of federalism invoked in the brief of the State of Georgia, and as such "should be regarded as an exception to the more general rule as to sovereign governments which this Court had applied in the *Cooper* case" (Pet. Jt. Br. 27). In *Cooper*, however, the Court stated that there was "no hard and fast rule of exclusion" (312 U.S. at 604-605), and there is nothing in *Evans* to show that the decision turned upon considerations of federalism.

n. 1), and does not imply a limitation.[6] Thus, numerous cases have construed the term "person" in federal statutes to cover governmental entities, despite the absence of any express reference to such entities in the statute.[7]

Foreign governmental entities come within this rule. Long before the Sherman Act it was established that foreign sovereigns may sue in the courts of the United States to the same extent as a domestic corporation or individual.[8] *The Sapphire*, 11 Wall. 164, 167-168; cf.

[6]Had Congress intended those two categories to be exclusive, it presumably would have used the word "means," as it did elsewhere in Section 1: "'Commerce' * * * means trade or commerce among the several States * * *." See *Helvering* v. *Morgan's, Inc.*, *supra*.

[7]See, *e.g.*, *Ohio* v. *Helvering*, 292 U.S. 360, 370-371 (revenue statutes); *California* v. *United States*, 320 U.S. 577, 585-586 (Shipping Act); *National Labor Relations Board* v. *Local Union No. 313, IBEW*, 254 F. 2d 221, 224 (C.A. 3) (National Labor Relations Act); *Burke* v. *Railroad Retirement Board*, 165 F. 2d 24 (C.A.D.C.) (Railroad Retirement Act); *Ruhl* v. *Railroad Retirement Board*, 342 F. 2d 662, 664-666 (C.A. 7), certiorari denied, 382 U.S. 836 (Railroad Retirement Act); *The Mercer County Improvement Authority*, 109 MCC 795, 798 (Interstate Commerce Act).

[8]This principle is firmly embedded in English law. The English Statute of Monopolies of 1623, 21 Jac. 1, c. 3, declared certain monopolies void and, in Section 4, gave the right to sue for treble damages to "any pson [person]" (without limitation) who was aggrieved. A number of nineteenth century English cases established that foreign sovereigns, including the United States, had the same standing to sue in English courts as a domestic plaintiff. *Hullet & Co.* v. *The King of Spain*, 6 Eng. Rep. 488 (Lords); *The King of Two Sicilies* v. *Willcox*, 61 Eng. Rep. 116, 129 (V.C.); *United States of America* v. *Wagner*, L.R. 2 Ch. 582; *The Emperor of Austria* v. *Day and Kossuth*, 45 Eng. Rep. 861 (Ch. App.). Floor debate on the Sherman Act indicated that it was the intention of Congress to incorporate in the Act English common law principles with respect to monopolies and unfair competition. See, for example, the remarks of Senator Hoar, a member of the Judiciary Committee that drafted the version of the bill as it finally passed Congress, and of Senator Sherman (21 Cong. Rec. 2456, 2459, 2460, 3146, 3152 (1890)).

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398, 408-412; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134-135, n. 2. Indeed, prior to the Clayton Act foreign governments, acting in their private and proprietary capacities, had brought unfair competition suits in American courts against United States companies. *French Republic* v. *Saratoga Vichy Co.*, 191 U.S. 427; *La Republique Francaise* v. *Schultz*, 94 Fed. 500 (S.D. N.Y.); *City of Carlsbad* v. *Kutnow*, 68 Fed. 794 (S.D. N.Y.); *City of Carlsbad* v. *Schultz*, 78 Fed. 469 (S.D. N.Y.). And the right of a foreign state to sue under a federal statute that did not include foreign states in its enumeration of eligible plaintiffs was recognized in *Swiss Confederation* v. *United States*, 70 F. Supp. 235, 236-237 (Ct. Cl.), certiorari denied, 332 U.S. 815. See also *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. 2d 396, 399 (C.A. 2), certiorari denied, 275 U.S. 571.

Petitioners nevertheless contend (Pet. Jt. Br. 19-20) that the general definition of "person" in R.S. 1 (1873-1874)[9] shows that Congress intended to define "person" in the Sherman Act so as to exclude "political bodies." They refer to the concern of the Commissioners initially hired by Congress to codify federal statutes,[10] that inclusion of political bodies in the definition of "person" would either be redundant of the term "corporation," or so broad as to require that subsequent statutes using the term "person" affirmatively exclude states, territories and foreign governments from the definition of that term (see Pet. Jt. Br. 19, n.

[9]R.S. 1 (1873-1874) provides:

> The word "person" may extend and be applied to partnerships and corporations * * *.

[10]Much of the Commission's work was redone. See Dwan and Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1013 (1938).

22). Although Congress did not include political bodies in R.S. 1's definition of "person," this omission does not show that this definition affirmatively excludes such bodies. Rather, the definition, now codified in 1 U.S.C. 1,[11] was phrased in illustrative words of inclusion that permit governmental bodies, foreign and domestic, to be treated as "persons" according to the context and purpose of the statute (see discussion *supra*, p. 5). Thus, even assuming that in the Sherman and Clayton Acts Congress adopted the definition of "person" in R.S. 1, that would not evidence a purpose to exclude political bodies, as *Evans*, *Chattanooga Foundry*, and the cases discussed above show.

4. It may be argued that it would be anomalous to treat a foreign government as a "person" entitled to sue for treble damages, while denying the United States the same right. This situation is no more anomalous, however, than permitting states and their subdivisions, but not the United States, to sue. Moreover, there is no true anomaly. The different treatment to be given the United States and foreign governments reflects a basic difference between the relationship of the United States and of foreign governments to the courts of the United States.

The United States as sovereign may legislatively select the remedies by which it will enforce its laws and define its rights in its own courts. The rationale of *Cooper* was that because Congress had given the United States other remedies for enforcing the antitrust laws, it did not intend the government also to be able to sue for treble damages. See *Georgia* v. *Evans*, *supra*, 316 U.S. at 161. A government

[11]1 U.S.C. 1 provides:

> [T]he words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals; * * *.

litigating in the courts of a foreign nation, however, stands on the same footing as any other litigant and has no control over its access to that country's courts. See, *e.g.*, *The Sapphire*, 11 Wall. 164, 167-168; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 408-412; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134-135, n. 2. Thus a foreign government is more like an individual, a corporation, or a domestic political body under the rationale of *Evans* than like the United States as sovereign under *Cooper*.

Indeed, denying foreign governments the right to sue for damages they have suffered as a result of a conspiracy by American firms to restrain and monopolize the foreign commerce of the United States would be inconsistent with the application of the antitrust laws to that commerce. It also would be inconsistent with statutes such as the Webb-Pomerene Act, 40 Stat. 516, as amended, 15 U.S.C. 61-65, which carefully specify the limited circumstances under which American firms may engage in collective activity in export trade that would otherwise violate the Sherman Act, so long as such activity does not restrain trade within the United States or restrain the export trade of nonparticipating competitors. 15 U.S.C. 62; See *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199.

It may also be argued (see Pet. 10-11) that it also would be anomalous to permit a foreign sovereign that restrains or restricts United States firms to sue those firms under the antitrust laws for damages it has suffered as a result of their collective retaliatory action. That is not this case. Nothing in United States law, however, authorizes American firms to resort to such self help. Cf. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 467-468. If any action is to be taken with respect to acts of foreign

sovereigns hostile to United States firms, that is a matter for the United States government; the victims cannot respond by committing antitrust violations against the foreign government involved.

5. It is not significant that foreign governments have not brought treble damage suits in the past. In the early years of this century, foreign governments rarely engaged in ordinary commercial activity. See, *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 700-701, n. 14 (opinion of White, J.). There was little occasion, therefore, for them to be exposed to injury from antitrust violations. This has changed, however: "Participation by foreign sovereigns in the international commercial market has increased substantially in recent years. Cf. International Economic Report of the President 56 (1975)" (*id.* at 703; opinion of White, J.).

When foreign governments acting in their commercial capacity enter the courts of the United States, they stand on the same footing—and have the same burdens and disabilities—as any domestic litigant. See *Alfred Dunhill of London, Inc., supra*; cf. the Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891 (foreign governments and their instrumentalities engaging in commercial activity in or directly affecting the United States have no sovereign immunity). They should not have the additional disability of being precluded from the antitrust recoveries that all other commercial entities may obtain in the United States courts.[12]

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[12]Petitioners quote (Pet. Jt. Br. 11) the statement in a recent speech by the Assistant Chief of the Foreign Commerce Section of the Antitrust Division that there is no evidence that the Sherman Act was intended "for the benefit of foreign persons in foreign markets, to hold to account United States exporters engaged in restrictive practices in those markets." The statement, however, was made in discussing a different issue from that in the present case. The speaker was considering the

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1977.

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hypothetical case of American firms whose restrictive practices were directed solely against a foreign firm and whose impact was felt solely in the foreign markets in which that firm operated, and which did not affect the foreign or domestic commerce of the United States.

The speaker's conclusion that in that hypothetical situation there would be no violation of the antitrust laws does not cover the present case, in which the conspiracy is alleged to have adversely affected the foreign and domestic commerce of the United States (see *supra*, p. 2). Indeed, the speaker specifically referred to the present case and stated (speech, p. 6) that there "the Eighth Circuit held, properly we think, that a foreign government has standing to sue as a person under the Sherman Act." For the convenience of the Court, copies of the speech have been lodged with the Clerk of the Court.

Although there has been considerable law review discussion of the standing of foreign governments to sue for treble damages for violations of the antitrust laws, none of these comments has suggested that a foreign government damaged by a conspiracy against the foreign and domestic commerce of the United States may not sue. See, *e.g.*, Note, *The Capacity of a Foreign Government to Bring an Action for Treble Damages Under the Federal Antitrust Laws*, 44 Geo. Wash. L. Rev. 287 (1976); Note, *The Capacity of Foreign Sovereigns to Maintain Private Federal Antitrust Actions*, 9 Cornell Int. L. J. 137 (1975); Note, *Foreign Nation Has Standing to Sue for Treble Damages*, 5 V and J. Trans. L. 531 (1972).